IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 84

O. B. WILLIAMS and LILLIE SHAVER HENDRIX,

Petitioners

vs.

THE STATE OF NORTH CAROLINA,

Respondent

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

HARRY McMULLAN,
Attorney General,

GEORGE B. PATTON,
Assistant Attorney General.

HUGHES J. RHODES,
Assistant Attorney General.
Counsel for the State of North Carolina, Respondent.

INDEX

	PAGE
Statement of the Case	1
Facts	2
Argument	3
I. The Denial of Petitioners' Pleas of Former Jeopardy Does not Present a Substantial Federal Question	3
II. The Writ of *Certiorari* Should be Denied, for the Federal Questions Presented have Already Been Decided Adversely to the Petitioners	5
III. The Writ of *Certiorari* Should be Denied, for the Constitutionality of the Statute Under Which Petitioners were Convicted has Already Been Decided Adversely to Them	7
Conclusion	8

AUTHORITIES CITED

American Railway Exp. Co. v. Kentucky, 273 U. S. 269	6
Ewing v. Tines (1942) C. C. A. 10), 131 F. (2d) 827	4
Andrews v. Andrews, 188 U. S. 14	6
Barron v. Baltimore, 7 Pet. 243	4
Bell v. Bell, 181 U. S. 175	6-8
Bell Telephone Co. v. Pennsylvania Public Utilities Commission, 309 U. S. 30	6
Com. v. Bradley, 2 Cush. 553	7
Cox v. State, 117 Ala. 103; 67 Am. S. R. 166; 41 L.R.A. 760	7
Crane v. Campbell, 245 U. S. 304	5
Davis v. Ohio, 241 U. S. 565	5
Dower v. Richards, 151 U. S. 659 (38:306)	6
Ex Parte Gresham, 53 Okl. Cr. 425, 12 P. (2d) 709	7
Graham v. West Virginia, 224 U. S. 616	5
Kennevel v. State, 107 Tenn. 581	7

Leonard v. Vicksburg, S. & P. R. Co., 198 U. S. 416
Maxwell v. Dow, 176 U. S. 581
Noble v. Mitchell, 164 U. S. 367
Palko v. Connecticut, 302 U. S. 319
People v. Ellis, 204 Cal. 39, 266 P. 518
Re Buchanan, 158 U. S. 31 (39: 884)
State v. Barnett, 83 N. C. 615
S. v. Johnson, 12 Minn. 467, 93 Am. D. 241
S. v. Moon, 178 N. C. 745
S. v. Palmer, 18 Vt. 570
S. v. Sloan, 55 Iowa 217
S. v. Stepp, 117 Iowa 591
S. v. Steward, 194 Mo. 345, 5 Ann. Cas. 963
State v. Williams and Hendrix, 224 N. C. 183
Streitwolf v. Streitwolf, 181 U. S. 179
United States v. Isaza, 260 U. S. 377
Utley v. St. Petersburg, 292 U. S. 106
White v. Texas, 310 U. S. 530
Constitution of the United States, Amendment XIV
Constitution of the United States, Article IV, Sec. 1
General Statutes 14-183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 999

O. B. WILLIAMS and LILLIE SHAVER HENDRIX,

Petitioners

vs.

THE STATE OF NORTH CAROLINA,

Respondent

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioners, O. B. Williams and Lillie Shaver Hendrix, seek by writ of *certiorari* to have the United States Supreme Court review the decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Caldwell County imposing sentence upon the petitioners for bigamous cohabitation. The opinion of the Supreme Court of North Carolina was filed April 12, 1944, and is reported as *STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX*, 224 N. C. 183.

FACTS

The petitioners were indicted for bigamous cohabitation under Section 14-183 of the General Statutes of North Carolina, the pertinent provisions of which follow:

"If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony . . . Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . ."

The evidence for the State showed that the petitioner Williams was married in North Carolina in 1916 to Carrie Wike Williams (R.6); that he lived here with his wife until May 7, 1940 (R.6); that Tom Hendrix, the husband of petitioner Hendrix, worked for petitioner Williams (R.7); that on May 15, 1940, petitioner Williams had left the State of North Carolina and was staying at the Alamo Court, Las Vegas, Nevada (R.44); that on June 26, 1940 (exactly six weeks after arrival in Nevada), by publication of summons, he instituted an action for a divorce in Nevada, in which action there was no appearance by the defendant (R.18); that a decree of divorce was granted by a Nevada court on August 26, 1940 (R.23); that petitioner Williams married petitioner Hendrix in Nevada on October 1, 1940 (R.8); that in the fall of 1940 the petitioners returned to North Carolina and lived in Pineola as husband and wife (R.11, 12, 13, 14, 15, 16); that petitioner Williams' first wife was still living at the time and had not procured a divorce (R.6).

The evidence for the State showed further that the petitioner Hendrix was married in North Carolina about 1920 to Tom Hendrix (R.7); that she lived in North Carolina with her husband until about May, 1940 (R.7); that she left the State suddenly, and on May 15, 1940, was staying at the same Alamo Court, Las Vegas, Nevada (R.40); that on June 26, 1940 (exactly six weeks after arrival), she instituted, by publica-

tion of summons, a suit for divorce in the State of Nevada, in which there was no appearance by Tom Hendrix, her husband; that a decree of divorce was granted by a Nevada court on October 4, 1940 (R.36); that on that same day (October 4, 1940) petitioner Hendrix was married to the petitioner Williams in Las Vegas, Nevada (R.8); that the petitioners immediately returned to Pinola, North Carolina, where they lived as husband and wife (R. 11, 12, 13, 14, 15, 16); that petitioner Hendrix' first husband, Tom Hendrix, was living at the time of this indictment and had not procured a divorce (R. 6).

The evidence also showed that the petitioners were gone from North Carolina only about three months (R. 8); that they employed the same attorney—L. S. Thompson, who was a lawyer practicing in Las Vegas, Nevada; and who also acted as Notary Public for both parties (R. 18 and 29), and that the petitioner Williams appeared as a witness for the petitioner Hendrix (R. 44).

The trial of this case proceeded upon the theory that no valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. The Supreme Court of North Carolina accepted the view of the State of North Carolina that the evidence showed that the petitioners acquired no domicile in Nevada, and, therefore, the divorce decrees granted in Nevada did not constitute a defense to this prosecution.

ARGUMENT

I

THE DENIAL OF PETITIONERS' PLEAS OF FORMER JEOPARDY DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a state court. The Fifth Amendment, which provides that no person shall for the same offense

be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by states.

Barron v. Baltimore, 7 Pet. 243;
United States v. Lanza, 260 U. S. 377.

The petition for *certiorari* thus presents no federal question under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

Amrine v. Tines (1942), C.C.A. 10, 131 F. (2d) 827.
Compare: *Palko v. Connecticut*, 302 U. S. 319;
Maxwell v. Dow, 176 U. S. 581.

In Amrine v. Tines, *supra*, it is said, at page 838:

"And, unlike the fundamental right to assistance of counsel granted by the Six Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a state court, the petitioners' pleas of former jeopardy could only have raised questions concerning rights guaranteed them by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the petitioners were not twice placed in jeopardy for the same offense in contravention of the North Carolina Constitution. Compare *White v. Texas*, 310

U. S. 530. The decision on this point was, therefore, a decision of a state court with respect to a question arising under the constitution of the state. Such a question, the United States Supreme Court cannot review.

Crane v. Campbell, 245 U. S. 304;
Davis v. Ohio, 241 U. S. 565;
Graham v. West Virginia, 224 U. S. 616.

II

THE WRIT OF CERTIORARI SHOULD BE DENIED, FOR THE FEDERAL QUESTIONS PRESENTED HAVE ALREADY BEEN DECIDED ADVERSELY TO THE PETITIONERS.

It is not disputed that Federal questions, *viz.*, whether the Nevada divorce decrees were entitled to recognition in North Carolina under Article IV, Section 1, and Amendment XIV of the Constitution of the United States, were decided in the trial of this case in the State court. However, under the rules and the decisions of this Court review on writ of *certiorari* is a matter not of right but of discretion. The fact that the Federal questions decided in the State court have previously been decided adversely to the contentions of the petitioners is a sufficient reason for denying the writ.

Utley v. St. Petersburg, 292 U. S. 106;
Leonard v. Vicksburg, S. & P. R. Co., 198 U. S. 416.

The single question presented by this portion of the petition is whether a recital in a divorce decree that the plaintiff is a bona fide resident of the state granting the divorce (the defendant in the action not being domiciled in the state granting the divorce and not being personally served with process in the state and making no appearance in the action), is conclusive on other states. If this question is to be answered in the affirmative, the Nevada divorces and subsequent marriage

of petitioners constituted a defense to the prosecution in North Carolina. Otherwise, they did not.

It is respectfully submitted that this question has been answered in the negative by the decision of this Court in *Bell v. Bell*, 181 U. S. 175. Compare: *Streitwolf v. Streitwolf*, 181 U. S. 179; *Andrews v. Andrews*, 188 U. S. 14.

In *Bell v. Bell, supra*, Mr. Justice Gray says:

> "The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted."

The petitioners seek to distinguish *Bell v. Bell*, 181 U. S. 175, on the ground that there the evidence showed that Bell was not domiciled in the state granting the divorce decree. Here, petitioners contend, the evidence is not sufficient to show that they were not domiciled in Nevada. This does not present a Federal question.

When a state court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United State Supreme Court on writ of *certiorari*.

> *Noble v. Mitchell*, 164 U. S. 367;
> *American Railway Exp. Co. v. Kentucky*, 273 U. S. 269;
> *Bell Telephone Co. v. Pennsylvania Public Utilities Commission*, 309 U. S. 30.

The following paragraph from the opinion of Justice White in *Noble v. Mitchell*, 164 U. S. 367, 373, would seem to be decisive of this phase of this contention:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. *Dower v. Richards*, 151 U. S. 659 (38:306); *Re Buchanan*, 158 U. S. 31 (39:884)."

III

THE WRIT OF CERTIORARI SHOULD BE DENIED, FOR THE CONSTITUTIONALITY OF THE STATUTE UNDER WHICH PETITIONERS WERE CONVICTED HAS ALREADY BEEN DECIDED ADVERSELY TO THEM.

The statute is not, as contended by the petitioners, extra-territorial in its operation. The North Carolina Supreme Court has recognized the inability of the State to punish for bigamy persons who are parties to a marriage ceremony celebrated outside the State. *State v. Barnett*, 83 N. C. 615. But the conduct which the statute in question prohibits is the cohabitation which takes place within the borders of North Carolina. This statute or ones similar thereto have been considered and held valid by the courts of the following states:

Alabama, *Cox v. State*, 117 Ala. 103, 67 Am. S. R. 166; 41 L. R. A. 760;
California, *People v. Ellis*, 204 Cal. 339, 266 P. 518;
Iowa, *S. v. Stenpper*, 117 Iowa 591, *S. v. Sloan*, 55 *ib.*, 217;
Massachusetts, *Com. v. Bradley*, 2 Cush. 553;
Minnesota, *S. v. Johnson*, 12 Minn. 467, 93 Am. D. 241;
Missouri, *S. v. Stewart*, 194 Mo. 345, 5 Ann. Cas. 963;
North Carolina, *S. v. Moon*, 178 N. C. 715;
Oklahoma, *Ex Parte Gresham*, 53 Okl. Cr. 425, 12 P. (2d) 709;
Tennessee, *Kenneval v. State*, 107 Tenn. 581;
Vermont, *S. v. Palmer*, 18 Vt. 570.

In *People v. Ellis*, *supra*, it is said:

"The power of the Legislature to so protect society against such an immoral act cannot be questioned."

It is true that these decisions are not binding on the United States Supreme Court; however, it is respectfully submitted that such persuasive authorities render any technical Federal

question which may arise of such minor importance as not to be worthy of consideration by this Court.

If the attack upon the validity of the North Carolina statute is to be considered as incidental to the argument that North Carolina was required to recognize the Nevada divorce decrees under the full faith and credit clause, it seems a sufficient answer to say that recognition was not required under *Bell v. Bell*, 181 U. S. 175, and the other authorities cited and discussed.

CONCLUSION

The question set out in the petition are not Federal questions, or if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. Therefore, the writ of *Certiorari* should be denied.

Respectfully submitted.

HARRY MCMULLAN,
Attorney General.

GEORGE B. PATTON,
Assistant Attorney General.

HUGHES J. RHODES,
Assistant Attorney General.
Counsel for the State of North Carolina, Respondent.